2003

Foxtail Properties v. Reece Goodrich; Shirley Ann Goodrich; Boyd J. Brown; Manuela H. Brown; Jerome H. Mooney; Bonnie S. Mooney; and Rema, INC. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FOXTAIL PROPERTIES, LLC Plaintiff/Appellant, v. REECE GOODRICH, TRUSTEE; SHIRLEY ANN GOODRICH, TRUSTEE; REECE GOODRICH, SHIRLEY ANN GOODRICH, BOYD J. BROWN; MANUELA H. BROWN; JEROME H. MOONEY; BONNIE S. MOONEY; AND REMA, INC., Defendants/Appellees.	: : : : : : : : :	Case No. 20031050 - CA

APPELLEE'S BRIEF

Appeal from an Order Granting Defendants' Motion for Summary Judgment in the Third Judicial District Court, Salt Lake County, Judge Sheila McCleve.

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JURISDICTION

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j), because this appeal was transferred by the Utah Supreme Court.

ISSUES PRESENTED

1. Did the trial court correctly conclude that Plaintiff could not state a claim for trespass based upon Defendant's refusal to remove certain utility fixtures on Plaintiff's property, when: (1) Plaintiff did not own its property when the utilities were installed; (2) Plaintiff was aware of the location of the utilities prior to acquiring an interest in the property; (3) the utilities benefitted both Plaintiff's and Defendant's property for almost three decades before Plaintiff intentionally severed its dependence upon them; and (4) there is no evidence that the utilities interfere with Plaintiff's current use of the property?

   Preservation: R. 211 at pages 2–3 and 5.

   Standard of Review: Because the trial court's decision was the result of a summary judgment motion, the appellate court grants the trial court's legal conclusions no deference, and reviews them for correctness. *See Arnold Indus., Inc. v. Love*, 63 P.2d 721, 725 (Utah 2002).

2. Did the trial court correctly conclude that Plaintiff's action is barred by the three year statute of limitations applicable to trespass, when the parties agreed that

certain utility fixtures on Plaintiff's property, which Plaintiff characterizes as a trespass, had been installed almost three decades before Plaintiff filed his Complaint?

Preservation: R. 124.

Standard of Review: Because the trial court's decision was the result of a summary judgment motion, the appellate court grants the trial court's legal conclusions no deference, and reviews them for correctness. *See Arnold Indus., Inc. v. Love,* 63 P.2d 721, 725 (Utah 2002).

3. Did the trial court correctly conclude that Defendants had an easement by implication for the utility fixtures, even though there was never absolute unity of title between the dominant and servient estates, and Defendants did not offer opinion testimony regarding their expected removal and relocation costs, but instead merely asked the trial court to infer that their installation costs would be comparable to costs the Plaintiff incurred in installing like utilities?

Preservation: R. 201 – 202.

Standard of Review: Because the trial court's decision was the result of a summary judgment motion, the appellate court grants the trial court's legal conclusions no deference, and

reviews them for correctness. *See Arnold Indus., Inc. v. Love,* 63 P.2d 721, 725 (Utah 2002).

4. Can the trial court be affirmed on the ground that the record shows it would be impossible for Plaintiff to prevail upon his only request for relief below, which was a mandatory injunction that would cause substantial economic waste and inconvenience to Defendants, but would achieve little or no benefit for Plaintiff?

Preservation: R. 211, pages 6 – 7.

Standard of Review: Appellate courts review a summary judgment for correctness, and accord no deference to the trial court's legal conclusions, regardless of whether the issue presented is based upon law or equity. *See Richards v. Security Pacific Nat'l Bank,* 849 P.2d 606 at 608 (Utah Ct. App. 1993).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

Utah Code Ann. § 78-12-26(1)

> An action may be brought within three years:
> (1) for waste, or trespass upon or injury to real property; except that when waste or trespass is committed by means of underground works upon any mining claim, the cause of action does not accrue until the discovery by the aggrieved party of the facts constituting such waste or trespass . . . .

Rule 65A, Utah Rules of Civil Procedure

See Addendum at page 32 for a copy of the Rule.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

Nature of the Case

This case is an action for a mandatory injunction which, if granted, would require Defendants to remove certain utility fixtures– including underground pipes, and underground vault, and a water meter–from Plaintiff's property, which is adjacent to that of Defendants'. *See* R. at 1–3. The utilities were installed in the early 1970s, at a time when the properties were under common ownership. *See* R. at 120. The utilities continuously served apartment buildings on the two adjacent parcels until 2002, when Plaintiff acquired his parcel. *See* R. at 120, paragraph 6; R. at 121, paragraph 16. Prior to purchasing its property, Plaintiff was aware of the existence and nature of the utilities. See R. at 135, Response No. 6. After its purchase, Plaintiff disconnected the utilities from its building, which was required by Plaintiff's lender as a condition of obtaining financing. *See* R. at 121-22. As a consequence, the utilities now remain on Plaintiff's property, but now serve only Defendants' property. Plaintiff claims that this is a trespass, and that Defendants must remove the utilities. *See* R. at 2–3.

After disconnecting the utilities, Plaintiff demanded that Defendants pay $11,326.67, which equals two thirds of the costs Plaintiff incurred when Plaintiff installed a separate connection to the water main and a separate meter to Plaintiff's building. *See* R. at 137. Because Defendants refused to pay two thirds of such costs, or in the alternative, remove the utilities, Plaintiff filed this action. *See* R. at 137 and 163.

Course of Proceedings

Defendants filed a Motion for Summary Judgment on or about June 10, 2003. *See* R. at 138–141. Plaintiff filed a Memorandum in Opposition on or about July 1, 2003. *See* R. at 149–175. Defendant's Reply Memorandum was filed on or about July 10, 2003. *See* R. at 176–181. Oral arguments were heard by the trial court on October 27, 2003. *See* R. at 211. Defendants' Motion for Summary Judgment was granted, and the trial court signed an Order dismissing Plaintiff's case on December 8, 2003. *See* R. at 195–203.

The trial court concluded that the installation of the utilities was not a trespass because they were installed by common owners of adjacent parcels, and thus the installation could not be a wrongful entry. *See* R. at 199. The trial court also concluded that no trespass occurred because Plaintiff did not have actual or constructive possession of its property at the time of installation. *See* R. at 200.

The trial court concluded, in the alternative, that even if the utilities were a trespass, they were a permanent trespass and that Plaintiff's cause of action was barred by the three year statute of limitations, which began to run in the early 1970s. *See id.* Finally, the trial court concluded that Defendants had demonstrated the elements of an easement by implication, which served as an absolute defense to Plaintiff's claim. *See* R. at 200–02. Plaintiff now appeals.

STATEMENT OF THE FACTS

In the early 1970s, the Jerome H. and Bonnie S. Mooney, and Boyd J. and Manuela Brown developed three apartment buildings on two adjacent parcels of real property, which they owned, on North Canyon Road in Salt Lake City. *See* R. at 119. On the northernmost parcel, the Mooneys and Browns built an apartment building known as "Elizabeth House." *See* R. at 120. On the adjacent parcel to the south, the Mooneys and Browns built two apartment buildings known as "Victoria Canyon North" and "Victoria Canyon South." *See id.* When the Elizabeth House and Victoria Canyon properties were developed, a common connection to the water main, pipes, and an underground vault and water meter (sometimes referred to hereafter as the "utility fixtures") were installed to serve both properties. *See id.* The utilities were installed primarily on the Elizabeth House side of the property line. *See id.* The utilities have been in place and have been used continuously since the early 1970s. *See id.*

At the time of development, the Mooneys, as joint tenants, owned an undivided 7/12 interest in the Victoria Canyons properties, and the Browns held an undivided 1/12 interest. The remaining 1/3 interest was held by W.J.M. and Brenda K. Touw. *See* R. at 162. Also at the time of development, the Mooneys, as joint tenants, held title to an undivided one quarter interest in the Elizabeth House property, and the Browns held the same type of interest; the other undivided one half interest in the Elizabeth House property was held by Elizabeth Buell Drinkhaus ("Drinkhaus"). *See* R. at 120. In 1995,

the Mooneys, the Browns, and Drinkhaus conveyed their interest in the Elizabeth House property to City Creek Square, L.C. ("CSS"). *See id.* Prior to the conveyance, Jerome Mooney informed Tom Felt, the managing member of CSS, that the Victoria Canyon property and the Elizabeth House Property shared a common utilities and meter; that the utilities was on the Elizabeth House property; and that water costs for both properties were always charged to the owners of the Victoria Canyon property. *See* R. at 143–144. Tom Felt determined, prior to CSS's purchase, that CSS would have no liability for the Victoria Canyon property water bill, even though the bill reflected the Elizabeth House property's water use. *See id.* CSS therefore bought the Elizabeth House property knowing that the utilities were primarily on the Elizabeth House side of the property line, and knowing that the Victoria Canyon Property benefitted from the utilities on CSS's property.

The Browns still retain a one quarter interest in the Victoria Canyons property, as joint tenants. *See* R. at 121. The Mooneys sold their interest in the Victoria Canyons properties prior to Foxtail's acquisition of the Elizabeth House property. *See id.* CSS eventually sold the Elizabeth House property to Chrysalis, a limited partnership, in the year 2000. *See* R. at 144.

Foxtail Properties, LLC, Plaintiff/Appellant herein (hereinafter, "Foxtail"), acquired the Elizabeth House property from third parties in approximately September of 2002. *See* R. at 121. Prior to its purchase, Foxtail was fully aware of the location and

nature of the utilities. *See* R. at 135, Response No. 6. As a condition of financing for the Elizabeth House property, Foxtail was required to sever the Elizabeth House property's connection to the Victoria Canyons water meter, and to install a separate meter. *See* R. at 135, Response No. 7. After expending approximately $16,990.00 on the installation of a separate water supply and meter for the Elizabeth House property, David Kottler, of Foxtail, demanded that the owners of the Victoria Canyons property pay two thirds of the cost. *See* R. at 137. Upon Defendants' refusal to pay this amount, Foxtail filed the instant lawsuit, claiming that the utilities serving the Victoria Canyon property is a trespass. *See* R. at 1. In its Complaint, Foxtail requested an injunction, requiring Defendants to "permanently remove [their] water meter, pipes, and vault off of Plaintiff's property and to fill the resulting hole in the ground." *See id.* Defendants' use of the utilities on Foxtail's property has been continuous since the 1970s, long before severance of the Browns' and the Mooneys' common ownership of the Victoria Canyon and Elizabeth House properties in 1995. *See* R. at 120.

SUMMARY OF THE ARGUMENTS

Trespass is a wrongful entry upon the lands of another. An action for trespass cannot be maintained by one who is not in actual or constructive possession of the property at the time of the alleged trespass. Foxtail has failed to state a cause of action for trespass because Foxtail did not have actual or constructive possession of its property at the time the alleged trespass occurred. The alleged trespass is the presence of utility

fixtures that were installed by Defendants in the early 1970s. Foxtail did not acquire its property until 2002. Moreover, the installation of the utilities was not wrongful because they were installed at a time when Foxtail's and Defendants' properties were owned in common by Defendants Browns and Mooneys. Foxtail contends that, nevertheless, the water which enters the utilities constitutes a continuing trespass upon its land. Yet the water is continually present, is contained within the utilities, and does not constitute a distinct "entry" that causes a separate infringement upon Foxtail's use of its land. The trial court's conclusion that no trespass has occurred should therefore be affirmed.

Even if the presence of the utilities could be deemed a trespass, the trespass would be barred by the three year statute of limitations because it is a permanent trespass. A permanent trespass is one of such character that it will presumably continue indefinitely. This includes structures such as buildings and pipes that are permanently rooted in the ground, which are intended to be permanent. It also includes the consequences of such structures, such as water flowing through pipes, if such consequences will also presumably continue indefinitely. In the present case, the utilities are permanent fixtures which have been rooted in the ground for approximately three decades. The fixtures include pipes that are continually full of water, and will presumably remain so indefinitely. Therefore, if the fixtures and their consequences are a trespass at all, they must be a permanent trespass. Because the utilities were installed

approximately thirty years before Foxtail filed its Complaint, Foxtail's Complaint is barred by the three year statute of limitations, and was properly dismissed.

In the alternative, the Court could hold that Defendants have an easement by implication, which would constitute a defense to Foxtail's claim. An easement by implication is created when (1) unity of title is followed by severance; (2) the easement is open and obvious at the time of severance; (3); the use of the easement is continuous, and (4) the easement is reasonably necessary to the dominant estate. In the present case, Foxtail argues that Defendants never had absolute unity of title because additional parties had an interest in both of the adjacent parcels at the time the utilities were installed. Nevertheless, Defendants Browns and Mooneys each had an undivided interest in the adjacent parcels when the utilities were installed. Therefore, there was a partial unity of title. Moreover, the utilities were installed to provide a benefit to both parcels, which Foxtail renounced to its detriment. Defendants therefore ask the Court to carve out an equitable exception to the requirement of absolute unity of title under the circumstances.

Finally, because Foxtail's only request for relief was a mandatory injunction, which would cause economic waste and great inconvenience to Defendants and would provide Foxtail with little or no benefit, Foxtail's Complaint was properly dismissed. A mandatory injunction is an extraordinary form of relief. Under the facts of the case at bar, it was requested only to extort money from Defendants. There is no evidence in the record that the utilities of which Foxtail complains have interfered with, or imminently

threaten to interfere with, Foxtail's use of its property. The utilities were not installed wrongfully, or with any knowledge that they would infringe upon anyone's property rights, but instead were installed to provide a common benefit to adjacent properties. Because Defendants' installation was innocent, and because requiring the removal of the utilities would cause great expense and inconvenience to Defendants, the Court of Appeals can properly affirm the trial court's dismissal of Foxtail's Complaint.

ARGUMENT

I. The District Court Correctly Concluded That There Was No Trespass, Because The Installation of the Utilities – Which Occurred More Than Two Decades Prior to Foxtail's Acquisition of its Interest in its Property – Did Not Constitute a "Wrongful Entry" Upon Foxtail's Land

Foxtail correctly observes that trespass, as defined by Utah Courts, is "a wrongful entry . . . upon the lands of another," *Holm v. B&M Service, Inc.*, 661 P.2d 951, 252 (Utah 1983), and that the "gist" of a cause of action for trespass is "infringement upon the right of possession." *See John Price Assoc., Inc. v. Utah State Conf. Bricklayers Locals,* 615 P.2d 1210, 1216 (Utah 1980). Foxtail ignores, however, the context of *John Price,* where a contractor claimed that union members who were picketing on a job site had wrongfully entered the site, and hence were trespassing. The court denied the contractor's claim, in part, because the contractor "did not have a possessory interest in the real estate." *See John Price*, 615 P.2d at 1214. Because the contractor did not, at the

time of the alleged trespass, have "actual or constructive possession of the land on which the acts of trespass were committed," the contractor was barred from maintaining his cause of action. *See id.* The *John Price* gloss on the definition of trespass does not in any way expand the core definition of trespass as a wrongful *entry* upon the land of another. Instead, it merely restates the principle that a party who claims trespass must have a possessory interest in the property at the time of the trespass in order to have any standing to make his claim.

Despite the fact that no "wrongful entry" by Defendants has occurred since the time Foxtail acquired its property, Foxtail claims that the mere presence of utility fixtures on his property constitute a trespass. Yet the utilities in question were installed in the early 1970s, long before Foxtail's acquisition of the property in 2002. *See* R. at 120. Foxtail had no possessory interest in the property in the 1970s when the utilities were installed, which is the only time the utilities could have "entered" the property. *See* R. at 121, paragraph 16. Moreover, the utilities were installed to provide culinary water to buildings on both Foxtail's and Defendants' properties. Because the installation was not "wrongful," the continued presence of the utilities cannot be a trespass.

Furthermore, it would be unfair and paradoxical indeed if the law could be twisted to make Defendants responsible for a predicament that was entirely a result of Foxtail's own choices and actions. Foxtail was aware of the existence and location of the utilities prior to purchasing its property, and knew that its mortgage lender would require their

removal. *See* R. at 135, Responses Nos. 6-7. Foxtail nevertheless chose to purchase its property and to assume the expense of severance and installation of separate utilities. Prior to Foxtail's acquisition of its property, the utilities of which Foxtail complains provided a benefit to apartment buildings situated on both Foxtail and Defendants' land for approximately 30 years. *See* R. at 120, paragraphs 4 and 6. It was only as a result of Foxtail's disconnection of the utilities from its building that the utilities ceased to provide a benefit to Foxtail. Because Foxtail's situation *vis-a-vis* the utilities is a result of its own action rather than any action taken by Defendants, Defendants should not be deemed guilty of the intentional tort of trespass.

In advancing its argument, Foxtail invites the Court to expand Utah case law to encompass the Restatement (Second) of Torts, § 158. Foxtail fails to mention, however, that this particular Restatement section is not binding authority in Utah courts because it has not been formally adopted. Moreover, section 158 of the Restatement was only included in a string cite in *Walker Drug Co., Inc. v. La Sal Oil Co.,* 972 P.2d 1238 at 1243 (Utah 1998). *Walker* contains no discussion or application of section 158.

The only Utah case, which Defendants are aware of, that discusses section 158 is *U.P.C., Inc. v. R.O.A. Gen'l, Inc.,* 990 P.2d 945 at 955 n.5 (Utah Ct. App. 1999). There, the court held that plaintiff lessor's argument was unavailing because he could not establish that the defendant lessee had a contractual "duty" to remove a billboard sign foundation upon the expiration of defendant's lease.

Even if the Court is persuaded that Restatement § 158 reflects Utah law, Foxtail has failed to explain how Defendants have a duty to remove the utility fixtures, except to assert that Foxtail demanded such in writing. Foxtail misses the point. The duty could only arise if the utilities were wrongfully placed upon Foxtail's property. Yet, as Foxtail admits, the utilities were installed by joint owners in order to serve adjacent properties. Foxtail does not argue, and could not argue, that the there was anything wrongful about the installation. Foxtail's argument is therefore nothing more than an *ipse dixit*. Foxtail has failed to cite any case law on point that demonstrates that under the facts of this case, Defendants have a duty to remove the utility fixtures.

Finally, Foxtail claims that the continued use of the utilities is a wrongful entry because water is "entering" the Foxtail property. Yet the utilities and the water are part of a self-contained, static system. *See* R. 211, pages 37–38. For all practical purposes, the utilities contain a permanent column of water, which has been present since the early 1970s. *See id.* There is no evidence that the water is breaching the pipes and actually entering Foxtail's buildings or grounds, or that it threatens any harm. Whether the utilities contain water, air, or nothing at all, their contents do not cause Foxtail any deprivation of its property that is separate and distinct from the mere presence of the utilities themselves. Because Foxtail has failed to establish a wrongful entry upon its land, the trial court properly determined that no trespass has occurred and properly granted summary judgment to Defendants.

II. The District Court Correctly Concluded That, Even if a Trespass Has Occurred, It is a Permanent Trespass and Hence Foxtail's Action is Barred by the Three Year Statute of Limitations

Even if the Court concludes that the utility fixtures in question are a trespass, they must be a permanent trespass. Therefore, Foxtail's cause of action is barred because the three year statute of limitations began to run in the early 1970s, when the utilities were originally installed. *See Breiggar Properties, L.C., v. H.E. Davis & Sons, Inc.,* 52 P.3d 1133 at 1135 (Utah 2002); *see also* Utah Code Ann. § 78-12-26(1).

A. The Utilities and Their Consequences Are Permanent in Nature

Under Utah law, a trespass is either permanent or continuing. *See Breiggar,* 52 P.3d at 1135. "Where a nuisance or trespass is of such character that it will presumably continue indefinitely, it is considered permanent, and the limitations period runs from the time the nuisance or trespass is created." *See Breiggar,* 52 P.3d at 1135.

In *Breiggar,* a road construction contractor dumped rocks and other debris on the plaintiff's property. The property owner did not discover the rocks and debris until almost a year after the road construction had been completed. The property owner then sued approximately two years and four months after discovery of the trespass. Because property owner's complaint was filed more than three years after the acts of trespass had ceased, the *Breiggar* Court held that the plaintiff's action was barred by the three year statute of limitation. *See Breiggar,* 52 P.3d at 1137.

The *Breiggar* Court reasoned that "[t]o hold otherwise by, for example, adopting a reasonable abatability test as advocated by Breiggar, would allow a plaintiff to bring a complaint against any trespasser– even if the trespass occurred decades earlier– as long as the harm caused by the trespass could be reasonably abated." *See id.* at 1136.

Foxtail argues that because Defendants can remove the utilities at any time (*see* Appellant's Brief at 24), the alleged trespass must be a continuing one. Yet this flies in the face of the *Breiggar* court's rejection of a "reasonable abatability test." The road construction contractor in *Breiggar* could just as well have removed the debris from the plaintiff's land, but the court rejected the notion that this possibility made the trespass a continuing one.

Like the rocks and debris resting on Breiggar's property, the utilities on Foxtail's property can only be a "permanent" trespass, if indeed they are a trespass at all. From the time they were installed, in the 1970s, as a permanent fixtures, they were of such a character that their existence would "presumably continue indefinitely." *See Breiggar,* 52 P.3d at 1135. Therefore, an action of trespass is now barred by the three year statute of limitations, which presumably expired sometime in the 1970s.

B. The *Hoery* Opinion Cited By Foxtail is Inapposite

Foxtail boldly attempts to rely upon the case of *Hoery v. U.S.,* 64 P.3d 214 (Colo. 2003). *Hoery* concerned the continuous leaching of a toxic chemical, known as "TCE," from an Air Force base into the plaintiffs' well. The plaintiffs sued under the Federal

Tort Claims Act, and the question of whether the leaching was a permanent or continuous trespass was certified to the Colorado Supreme Court. The *Hoery* court held that the continuous leaching of TCE onto plaintiffs' land was a continuing trespass, and that a new cause of action arose each day the leaching continued. *See id.* at 223.

Rather than supporting Foxtail's position, the rationale of *Hoery* actually favors Defendants' position. In *Hoery,* the court explained:

> . . .Colorado law recognizes the concepts of continuing trespass and nuisance for those property invasions where a defendant fails to stop or remove continuing, **harmful, physical conditions** that are **wrongfully placed** on a plaintiff's land. The only exception is a factual situation–such as an irrigation ditch or railway line–where the property invasion will and should continue indefinitely because the defendants, with lawful authority, constructed a socially beneficial structure intended to be permanent.

Hoery, 64 P.3d at 220 (emphasis added).

First, under the facts of the case at bar, the utilities were not wrongfully place upon Foxtail's land. They were placed there by common owners of adjacent property in order to provide a benefit to both properties. Second, no evidence has been presented that the utilities have caused, or threaten to cause, harm to Foxtail's property. Third, the utilities are socially beneficial, much akin to the railroads or irrigation ditches mentioned in *Hoery* because they originally supplied culinary water to the apartment buildings situated upon the land of both parties. This mutually beneficial state of affairs was unilaterally

terminated by Foxtail, who now attempts to cry foul about the consequences of its own action.

C. A New Cause of Action Did Not Accrue When Foxtail Acquired its Property

Foxtail also claims that its cause of action could not have accrued until it purchased its property. While this argument has some appeal as a matter of logic, courts that distinguish permanent from continuing trespass have nevertheless held that a permanent trespass cannot be revived, for statute of limitations purposes, merely by the fact that a new owner acquires an interest in the land. *See Castelletto v. Bendon,* 13 Cal. Rptr. 907 (Cal. App. 1961); *Bertram v. Orlando,* 227 P.2d 894 (Cal. App. 1951).

In *Castelletto,* plaintiffs sued for a mandatory injunction, requiring defendants to remove three wooden buildings erected upon defendants' lot, which had a "toe hold" over the boundary between plaintiff and defendants' properties. The buildings had been erected at least twelve years prior to plaintiff's action. Defendants appealed the issuance of the injunction.

On appeal, the *Castelletto* court reversed, holding that the trespass was permanent, and that plaintiff's claim was barred by the three year statute of limitations. "One was erected on concrete piers, another on a 'permanent and continuous foundation.' As the term is used in the cases they were of a 'permanent nature,' and the statute had run long before the plaintiffs acquired their property and before the action was commenced." *See Castelletto*, 13 Cal. Rptr. at 910. The *Castelleto* court thus implicitly held that a new

owner's acquisition of property does not rewind the clock for statute of limitations purposes where a permanent trespass is concerned.

Similarly, in *Bertram,* the appellate court reversed the grant of a mandatory injunction requiring defendants to remove concrete piers that encroached upon adjacent land because the structure was intended to be permanent and had been erected twenty years prior to trial by defendant's predecessor-in-interest. Plaintiff's action there was also barred by the three year statute of limitations. *See Bartram,* 227 P.2d at 896.

At least one court has applied the *Bartram/Castelletto* rationale to underground pipes. *See Sustrik v. Jones & Laughlin Steel Corp.,* 197 A.2d 44 (Penn. 1964). In *Sustrik,* plaintiff had brought claims for trespass based upon the wrongful removal of coal, resulting soil subsidence, and the existence of a drain pipe installed by defendants, all under plaintiff's land. The *Sustrik* court held that the coal removal and land subsidence claims were barred by a prior settlement agreement and by *res judicata.*

With regard to the sewer pipes, which drained water from defendants' adjacent mine, the *Sustrik* court noted that the pipes had been constructed more than forty years before the plaintiff filed its action, and held that:

> . . .a continuing trespass must be distinguished from a trespass that effects a permanent change in the condition of the land. The latter, while resulting in a continuing harm, does not subject the trespasser to liability for a continuing trespass. [. . . .] If a nuisance at the time of creation is a permanent one, **the consequences of which in the normal course of things will continue indefinitely,** there can be but a single action therefor to recover past and future damages

> and the statute of limitations runs against such cause of action form the time it first occurred . . . .

See Sustrik, 197 A.2d at 46-47 (emphasis added).

Sustrik powerfully demonstrates that Foxtail has, as a matter of law, incorrectly characterized the water, contained by the utilities in the case at bar, as a continuing trespass. Under the *Sustrik* rationale, even if the *consequences* of a permanent trespass will continue indefinitely (such as the coursing of water through pipes), the resulting and ongoing consequences do not necessarily convert the original, permanent trespass into a continuing one

D. The Latest Date a Cause of Action for Trespass Could Have Accrued Was 1995 - Seven Years Prior to Foxtail's Complaint.

Foxtail also argues that Defendants had continuous permission to use the pipes until one of its predecessors-in-interest, City Creek Square, L.L.C. ("CSS"), granted the property to a third party in the year 2000. Based upon this misstatement of the facts, Foxtail concludes that no actual trespass occurred until, at earliest, the year 2000, when Defendants ceased to have permission for the present location of the utilities. *See* Appellant's Brief at 20–21.

Defendants have searched the record in vain for any evidence that CSS gave explicit permission to them regarding the use or location of the utilities. There is absolutely no indication in the record that CSS ever unequivocally waived its right to sue Defendants for trespass based upon the location of the utilities. Therefore, the alleged

trespass, if any, occurred on or before the year 1995, when Defendants first transferred away their interest in what is now Foxtail's property. Even if the alleged trespass occurred as late as 1995, Foxtail's suit was not filed until approximately seven years later, and is therefore still barred by the three year statute of limitations.

III. The Trial Court Correctly Concluded That Defendants Had an Easement by Implication for the Utility Fixtures, Even Though There Was Never Absolute Unity of Title Between the Dominant and Servient Estates, and Even Though Defendants Did Not Offer Independent Evidence of Their Expected Removal and Relocation Costs

Defendants cannot escape the fact that this case does not present a paradigmatic instance of "unity of title" sufficient to support an implied easement. Defendants believe, however, that the facts of this case present an opportunity for Utah Courts to carve out a limited exception to the usual rule that there must be absolute unity of title, followed by severance in every case. In cases where a purchaser of land has full knowledge of and open and obvious easement, which has been continuously used prior to severance, and the easement *provides a reasonably necessary benefit to both parcels, which the purchaser alters to his own detriment,* absolute unity of title between the former owners should not be required to support an implied easement in favor of the dominant estate.

While this argument was not raised below, a trial court's decision may be affirmed on any proper ground or theory apparent from the record, even if it does so upon a ground that differs from the one the trial court has relied upon. *See Bill Nay & Sons Excavating v. Neeley,* 677 P.2d 1120, 1123 (Utah 1984) (affirming trial court's decision on alternate

ground of purchase money resulting trust, although trial court decision was grounded upon finding of fraudulent conveyance); *Dipoma v. Mcphie*, 29 P.3d 1225, 1230 (Utah 2001) (affirming dismissal of case for failure to pay filing fee, but on grounds of lack of timeliness rather than on jurisdictional grounds). This holds true even if such ground or theory was not raised in the lower court, and was not considered or passed on by the lower court. *Id.*

The rationale for an easement by implication, under Utah law, is clear: "An easement created by implication arises as an inference of the intention of the parties to a conveyance of land. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyances. * * * The presumption of law is that the parties contracted with a view to the condition of the property as it actually was at the time of the transaction, and after sale neither one had a right, without the consent of the other, to change that condition, which openly and visibly existed, to the detriment of the other." *See Butler v. Lee,* 774 P.2d 1150 at 1153 (Utah Ct. App. 1989) (citing *Adamson v. Brockbank,* 185 P.2d 264, 270-72 (1947).

Foxtail was fully aware of the location and nature of the utility fixtures on its property prior to acquiring its property. *See* R. at 135, Response No. 6. Foxtail was further aware that, although its property had benefitted from the existence of the utilities for over two decades, it could not obtain financing from the lender involved in the sales transaction unless it installed equipment necessary to separately meter its own water use.

See id., Response No. 7. In spite of its knowledge, Foxtail nevertheless chose to purchase its property and to separate the water supply. There is no evidence in the record that Foxtail inquired of other lenders whether or not this requirement was an industry standard.

Because there is no evidence that Foxtail's alteration of the status quo was absolutely necessary, or that Foxtail was compelled to buy this particular property rather than another property, it is fair to say that Foxtail wilfully renounced the longstanding benefits provided by the preexisting utilities on its property. After renouncing such benefits, provided by Defendants, Foxtail demanded yet a further benefit from Defendants: reimbursement of two thirds of Foxtail's costs of severance and the installation of replacement utilities. *See* R. at 137. The true motivation for Foxtail's lawsuit was not a concern with trespass, but rather, the notion that Foxtail could extort two thirds of Foxtail's utility re-installation costs from Defendants. *See* R. at 122 and 137.

Yet it is clear that Foxtail brought this expense upon itself. For this reason, and because Foxtail contracted to purchase its property "with a view to the condition of the property as it actually was at the time of the transaction," the Court should conclude that partial, rather than absolute, unity of title was sufficient, in the instant case, to support an easement by implication.

Foxtail also claims that Defendants cannot meet the "reasonable necessity" prong of the elements of easement by implication. With regard to the "necessity" prong of the test for an implied easement, absolute necessity is not required. *See Butler v. Lee,* 774 P.2d 1150 (Utah Ct. App. 1989). In *Butler,* the trial court found that the restructuring of storage units on the dominant estate to accommodate the alternate access that would be available without the easement was "impractical and economically unfeasible." *See Butler,* 774 P.2d at 1154. In answering appellant's contention that an easement by implication should only be inferred when the use of such is absolutely necessary to the enjoyment of the dominant estate, the Court held that "[i]n Utah, there must be a reasonable necessity to imply an easement. * * * Appellant's contention is thus mistaken." *See id.* (citations omitted).

Foxtail maintains that Defendants have failed to support, with admissible evidence, their contention that the removal of the old, and installation of a new, utilities to serve Defendants' property would be prohibitively expensive. *See* Appellant's Brief at 33. Yet Defendants presented evidence, in the form of Foxtail's own admission, that Foxtail spent $16,690.00 merely to install a new system on its own property. *See* R. at 137. Moreover, Foxtail was not required, additionally, to remove existing underground pipes, an underground vault, a manhole cover and meter, as Defendants would be required to do upon the issuance of Foxtail's proposed injunction.

Foxtail's own admission regarding its costs, while not direct or exact proof of Defendants' anticipated costs, nevertheless has "a tendency to make the existence of . . . [a] . . . fact [i.e., that Defendant's costs will be significant] that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *See* Rule 401 of the Utah Rules of Evidence. Foxtail's admission was relevant to show that Defendants would incur significant costs and inconvenience if Foxtail's proposed injunction were to issue. All relevant evidence is ordinarily admissible. *See* Utah R. Evid. 402. Therefore, it is simply not true that Defendants failed to provide any evidentiary support for their contention that the removal and reinstallation of the utilities elsewhere would involve a significant inconvenience and expense.

Because Defendants would be required, not only to install new utilities upon their property if Foxtail's injunction were to issue, but would also be required to remove the preexisting utilities from Foxtail's property and to restore the landscaping, the trial court could reasonably infer that the inconvenience and economic burden to Defendants outweighed the benefits of the proposed injunction to Foxtail.

For the foregoing reasons, the Court should affirm the trial court's decision that, as a matter of law, Defendants have an implied easement for the utility fixtures of which Foxtail complains.

IV. Because a Mandatory Injunction–Which Would Result Only In Economic Waste and Provide Little or No Benefit to Plaintiff–Was the Only Relief Foxtail Was Entitled to Based Upon Its Complaint, the Trial Court's Decision Should Be Affirmed

Foxtail did not request actionable money damages in its Complaint[1], but instead only prayed for a mandatory injunction and "such other relief as the court deems proper." *See* R. at 3. Indeed, Foxtail could have no entitlement to money damages because the measure of damages for trespass is the value of the property before the trespass minus the value of the property after the trespass. *See Pitts v. Pine Meadows,* 589 P.2d 767 at 769 (Utah 1978). Because the alleged trespass, in this instance, was a condition that predated Foxtail's acquisition of its property, there are no pre- or post-trespass values to compare and hence no basis for an award of money damages.

For the foregoing reasons, Foxtail's only possible relief would be a mandatory injunction. What Foxtail specifically requested was "an injunction ordering Defendants to permanently remove its water meter, pipes, and vault off of Plaintiff's property and to fill the resulting hole in the ground." *See* R. at 3. The question therefore arises as to whether, in light of the record, Foxtail could have met the burden necessary to prevail upon its request for such an injunction. *See* Utah R. Civ. P. 65A (providing that movant must show: (1) irreparable harm; (2) that on balance, harm to non-movant resulting from injunction will not outweigh current harm to movant; (3) that the injunction would not

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[1]Foxtail requested costs of suit and attorney's fees, for which there is no contractual or statutory basis. *See* R. at 3.

violate public policy; and (4) that movant can show a substantial likelihood of prevailing on the merits). If Foxtail could not meet this burden under the facts presented in the record, then the Court has an additional reason to affirm the trial court's ruling.

A mandatory injunction is an extraordinary form of relief, and should not be granted when it will provide little or no benefit to the plaintiff, and will cause substantial economic waste. *See Penelko v. John Price Associates, Inc.,* 642 P.2d 1229 at 1235 (Utah 1982). Particularly where an encroachment is in good faith, and not willful, courts should consider all the relevant circumstances, and not become parties to extortion. *See Golden Press v. Rylands,* 235 P.2d 592 at 595 (Colo. 1951).

In *Penelko,* the plaintiff sought a mandatory injunction requiring defendants to remove a restaurant building that encroached upon a parking area that was part of plaintiff's leasehold. The trial court awarded plaintiff money damages, but denied the requested injunction. The plaintiff appealed the denial of the injunction. The *Penelko* court affirmed, reasoning that:

> Injunctive relief should be granted only when it is consistent with basic principles of justice and equity and it is not appropriate where there would be little or no benefit to the complainant. * * * * The burden to Price in removing the restaurant and the improvements incidental thereto would involve substantial economic waste. * * * Except in extraordinary circumstances, injunctive relief should not be granted where events have rendered such relief unnecessary or ineffectual.

See Penelko, 642 P.2d 1229 at 1235.

In *Golden Press,* the plaintiff succeeded in obtaining a mandatory injunction requiring the removal of foundation footings of defendants' building, which encroached upon plaintiff's land. The encroachment was slight and did not interfere with plaintiff's use of the property. *See Golden Press,* 235 P.2d at 596. Plaintiffs testified, that if they ever wanted to build a basement flush with the property line, the footings would require a minimal detour. *See id.* Plaintiffs refused to permit entry on their property for purposes of chipping the footings, and demanded that all work be done from defendant's side of the property.

In reversing the injunction, the *Golden Press* court noted that the encroachment was not willful, but instead likely the result of a good faith but mistaken survey. *See id.* at 595. The court also observed that the expense and hardship of removal was so great, in comparison with any advantage to plaintiffs, that the injunction was unconscionable. *See id.* at 596. The court therefore reversed the injunction because the encroachment did not interfere with plaintiffs' current use; because it was not willful or intentional; and because the hardship to defendants was great but the benefit to plaintiffs was minimal. *See id.* at 595.

In the case at bar, there is no evidence in the record that the utility fixtures on Foxtail's property interfere with Foxtail's use. Foxtail operates an apartment building on the property, and this has been the primary use of Foxtail's property for approximately

three decades. See R. at 119–120. Therefore, there can be no question that Foxtail will derive little, if any benefit, from the injunction it has requested.

Further, the utility fixtures, which Foxtail contends must be removed, were not placed there wrongfully, or with any knowledge that such would infringe upon Foxtail's rights. In fact, they were installed to provide a benefit to what is now Foxtail's property and also to the adjacent property, at a time when both properties had common owners. *See* R. at 120. It was Foxtail's own decision to renounce that benefit, and to render the utilities useless as far as Foxtail was concerned. Therefore, the utilities were installed in good faith, and without any intent to interfere with the property rights of another.

Finally, the hardship that the proposed injunction would case to Defendants so far outweighs any imaginable benefit to Foxtail, that the proposed injunction would be unconscionable. While there is no evidence in the record as to exactly what the costs would be to Defendants, Foxtail has admitted to costs of $16,990.00 just to run a new line from the water main and to install a new meter on its property. The Court can infer that Defendants will incur comparable or even higher costs if the proposed injunction issues, because Defendants will be required not only to install a new connection to the water main, but will also be required to remove the old water meter, pipes, manhole cover, and vault from Foxtail's property. Because the injunction would cause Defendants significant expense and inconvenience, and because the injunction would provide little or no benefit to Foxtail, the trial court properly dismissed Foxtail's Complaint.

CONCLUSION

Foxtail's Complaint was properly dismissed, the trial court's decision should be affirmed, and Defendants should be awarded their costs in responding to this appeal. First, there was no trespass by Defendants because they did not wrongfully enter, or cause a wrongful entry, onto Foxtail's property. Second, Foxtail did not even own the property at the time the utilities were installed, so the installation could not be a trespass. Finally, the water contained within the pipes is not a separate and distinct entry, but rather, a static, contained condition that causes no independent interference with Foxtail's land.

Even if the utilities and the water they contain could be a trespass, a cause of action for such trespass is barred by the three year statute of limitations. The utilities were installed, and began providing water to both properties approximately three decades ago. Because this is a condition that will presumably continue indefinitely, the statute of limitations expired long ago, and Foxtail's claim is time barred.

Defendants also believe that the Court could affirm on the ground that Defendants have an easement by implication over Foxtail's land. All the elements are met, except for the technical requirement of unity of title. While the facts of this case do not present a paradigmatic instance of unity of title, there was nevertheless a partial unity of title at the time the utilities were installed. Because Foxtail deliberately disconnected the utilities which formerly provided it with a benefit, an equitable exception to the requirement of absolute unity of title should be made in this instance.

Finally, because the utilities do not interfere with Foxtail's use of its property, the proposed mandatory injunction could never have issued. It would have caused economic waste and great inconvenience to Defendants, without providing Foxtail with any significant benefit. It is therefore clear, from the record, that Foxtail could not have met the requirements of Rule 65A of the Utah Rules of Civil Procedure. Therefore, the trial court properly dismissed Foxtail's Complaint, and its decision should be affirmed.

Respectfully submitted this 24th day of March, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing APPELLEE'S BRIEF were served upon counsel of record at the addresses listed below by depositing the same in the United States mail, postage pre-paid on this 24th day of March, 2004.

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ADDENDUM

Rule 65A. Injunctions.

1. (a) Preliminary injunctions.

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of hearing. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible at the trial on the merits becomes part of the trial record and need not be repeated at the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) Temporary restraining orders.

(1) Notice. No temporary restraining order shall be granted without notice to the adverse party or that party's attorney unless (A) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (B) the applicant or the applicant's attorney certifies to the court in writing as to the efforts, if any, that have been made to give notice and the reasons supporting the claim that notice should not be required.

(2) Form of order. Every temporary restraining order shall be endorsed with the date and hour of issuance and shall be filed forthwith in the clerk's office and entered of record. The order shall define the injury and state why it is irreparable. The order shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record.

(3) Priority of hearing. If a temporary restraining order is granted, the motion for a preliminary injunction shall be scheduled for hearing at the earliest possible time and takes precedence over all other civil matters except older matters of the same character. When the motion comes on for hearing, the party who obtained the temporary restraining order shall have the burden to show entitlement to a preliminary injunction; if the party does not do so, the court shall dissolve the temporary restraining order.

(4) Dissolution or modification. On two days' notice to the party who obtained the temporary restraining order without notice, or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification. In that event the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require.

(c) Security.

(1) Requirement. The court shall condition issuance of the order or injunction on the giving of security by the applicant, in such sum and form as the court deems proper, unless it appears that none of the parties will incur or suffer costs, attorney fees or damage as the result of any wrongful order or injunction, or unless there exists some other substantial reason for dispensing with the requirement of security. No such security shall be required of the United States, the State of Utah, or of an officer, agency, or subdivision of either; nor shall it be required when it is prohibited by law.

(2) Amount not a limitation. The amount of security shall not establish or limit the amount of costs, including reasonable attorney fees incurred in connection with the restraining order or preliminary injunction, or damages that may be awarded to a party who is found to have been wrongfully restrained or enjoined.

(3) Jurisdiction over surety. A surety upon a bond or undertaking under this rule submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) Form and scope.

Every restraining order and order granting an injunction shall set forth the reasons for its issuance. It shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. It shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice, in person or through counsel, or otherwise, of the order. If a restraining order is granted without notice to the party restrained, it shall state the reasons justifying the court's decision to proceed without notice. (e) Grounds. A restraining order or preliminary injunction may issue only upon a showing by the applicant that:

(1) The applicant will suffer irreparable harm unless the order or injunction issues;

(2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;

(3) The order or injunction, if issued, would not be adverse to the public interest; and

(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

(f) Domestic relations cases.

Nothing in this rule shall be construed to limit the equitable powers of the courts in domestic relations cases.